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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-53

EDWARD DEJESUS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinion Below

The opinion of the court below (Appendix A) is not yet reported.

Jurisdiction

The judgment of the court below was entered on June 10, 1975. A Petition for Stay of Mandate was filed on June 25, 1975, and was allowed on June 26, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether a conspiracy indictment under 21 U.S.C. § 846 requires an allegation and proof of an overt act.

2. Whether there was sufficient objection and remarks by the Defendant so that the Court should have instructed the jury that the conspiracy must be established by non-hearsay evidence prior to the introduction of an absent co-conspirators hearsay statements.

Statement

The defendant was indicted along with one other person, Clarke Johnson, in an indictment (See Appendix A), charging one violation of 21 U.S.C. Section 841 (a) (1) and the violation of 21 U.S.C. Section 846. (See Appendix B). No overt act was alleged in the Conspiracy Count under 21 U.S.C. Section 846. The alleged co-conspirator, Clarke Johnson, at the time of the trial, was of parts unknown and did not go to trial. The Defendant pleaded not guilty and the trial began on October 29, 1974.

At the trial, Government Agents testified that they met with the co-defendant, Johnson, in Boston, and discussed the purchase of five kilograms of cocaine at $20,000 a kilogram. After a few days Johnson told the agents that his Puerto Rico connection was in town. An agent subsequently observed the Defendant meeting with Johnson in the Defendant's car for a brief conversation. Later on the agent called Johnson and learned that only two kilograms were for sale since the other three had just been sold in New York, and that the price was increased to $22,000.00 a kilogram. Johnson, still later the same evening, delivered a sample to the agents, and if the sample proved satisfactory the agents were to make the purchase at about midnight. Shortly after midnight, at the agreed upon place,

a vehicle parked behind the agents' vehicle and Johnson got out, told the agents that his man was with him, with the "stuff", and entered the agents' car. One agent then entered the other car. The Defendant, the driver of the other car, handed the agent a paper bag, saying the amount of 2 kilograms. The agent testified that the defendant explained that he had sold the other three kilograms in New York, the preceding weekend. The Defendant stated that the price was $44,000.00, the cocaine could be cut three times, and that he could deliver five kilograms every ten days. The defendant denied saying these things when he testified.

During the trial, the Court allowed the Government Agents to testify as to conversations with the absent co-defendant, co-conspirator, Johnson, over Defendant's objection. Earlier in the trial, the Court gave a limiting instruction couched as follows:

> "The Court: ... The evidence which I am allowing in now as to telephone conversations between this witness and Mr. Johnson is to be considered by you when you retire to deliberate, only if you find that there was in fact a conspiracy between the defendant and Mr. Johnson and that the conversation was in furtherance of some purpose of the conspiracy and that the conversation was during the lifetime of the conspiracy.
>
> "I will instruct you to disregard the whole thing, if at the time the government rests, there isn't enough evidence from which you can find conspiracy, if you believe the evidence. Whether you do find it is a matter for your decision."

When the government agent adverted to the "Puerto Rican Connection", the Defendant objected; the Court

overruled the objection and reminded the jury of its earlier limitation. When the witness related his conversation about the price with Johnson, defense counsel moved for a further limiting instruction "as it affects the defendant, DeJesus". The court again referred to the earlier limitation which it felt the jury understood, adding, "I don't think I need repeat it with each question, unless there is some other limitation you have in mind?" Counsel replied: "I do not know if the jury is fully instructed that none of this evidence is against DeJesus at this point, there is no conspiracy shown." The Court: 'I told them it is (their) decision they have to make when they retire to deliberate. If they don't find a conspiracy, they disregard the entire line of testimony which relates only to Mr. Johnson."

The testimony of the agent continued, followed by that of another agent, with frequent disclosures of conversations with Johnson, always objected to, the court often referring to its prior ruling in admitting the testimony. In the charge to the jury, the court again stressed that statements attributed to Johnson were to be considered only if the jury found that defendant "voluntarily and knowingly entered into an agreement", adding, at one point, that "in deciding whether the defendant became a member of the conspiracy, you must determine his membership on the basis of evidence as to what he said or what he did, if it appears to you that the conspiracy was in fact formed." At the conclusion of the charge, defense counsel called to the court's attention one of his requested instructions which would have told the jury that "in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members." The Court replied: "I charged that, that is

my own material, what he said and what he did." The defendant filed a motion to strike all conversations with Johnson and the Court denied it.

The Defendant was found guilty on both Counts, one, charging a conspiracy to distribute cocaine, and the other, possession with intent to distribute and distribution. The Defendant was sentenced and filed a Notice of Appeal. The Defendant filed a Motion In Arrest Of Judgment on the grounds that 21 U.S.C. § 846 is unconstitutionally vague and indefinite by its failure to require an overt act, and that 21 U.S.C. § 846 requires an overt act to be alleged and proved. The Motion was denied.

Reasons for Granting the Writ

The court below upheld Defendant's conviction on a finding that: (1) the Defendant's objections to the absent co-conspirator's hearsay statements did not raise the issue the First Circuit later decided in *U. S.* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), *cert. denied*, 43 U.S.L.W. 3584 (April 28, 1975), that independent non-hearsay evidence must be introduced to establish a conspiracy, prior to the introduction of a co-conspirator's hearsay statements; and (2) a conspiracy indictment under 21 U.S.C. §846, which on its face requires no overt act, does not require an allegation or proof of an overt act.

This case presents an important issue in that it would decide whether or not an overt act is required in a conspiracy indictment under 21 U.S.C. §846. There appears to be a split among the Circuits and/or at the very least much confusion. The First Circuit has now decided in this case that no overt act is necessary. The following courts seem to require one: *United States* v. *Floyd*, 496 F.2d 982, 987-988 (2nd Cir. 1974); *United States* v. *Toombs*, 497 F.2d 88 (5th Cir. 1974); *United States* v. *Williams*, 503

F.2d 50 (6th Cir. 1974); *United States* v. *Cotham*, 363 F. Supp. 851 (W.D. Tex. 1973).

The following courts do not require an overt act: *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Calif. 1962) [precursor statute]; *United States* v. *DeViteri*, 350 F. Supp. 550 (E.D. N.Y. 1972); *Ewing* v. *United States*, 386 F.2d 10 (9th Cir. 1967) [precursor statute].

It has long been held that there must be present in Indictments charging conspiracy, under the overwhelming preponderance of Federal criminal statutes, three key elements: (a) an agreement; (b) an unlawful object toward which the agreement is directed; and (c) an overt act. *United States* v. *Root*, 366 F.2d 377 (9th Cir. 1966); *Davenport* v. *United States*, 260 F.2d 591 (9th Cir. 1958), *cert. den.* 359 U.S. 909 (1959); *Rivera* v. *United States*, 57 F.2d 816, 819 (1st Cir. 1932). This requirement for an overt act is well set forth in the cases interpreting 18 U.S.C. §371. This statute added the requirement of "overtness" to the common law crime of conspiracy. *Deacon* v. *United States*, 124 F.2d 352 (1st Cir. 1941).

It is the contention of the defendant, that the failure of Count I of the Indictment to allege an overt act renders it insufficient as a matter of law.

It is also obvious that on its face 21 U.S.C. §846, under which the Defendant was charged, does not seem to require that an overt act actually occur. It merely states in general terms, that:

> "... any person ... conspires to commit any offense in this subchapter ... (violates the statute)."

One cannot conclude from this that the statute eliminates the requirement for an overt act to be alleged and proved. The Defendant contends that the enactment of 21 U.S.C. §846 was for the purpose of bringing a conspiracy to

violate this new law within the stringent parameters of a severe penalty statute, and not to create a new conspiracy offense. This is supported by the wording of the "purpose" section of the 1970 law, which expressly states that the legislation was designed "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States... (3) providing for an overall balanced scheme of criminal penalties for offenses involving drugs." 1970 U.S. Code, Cong. & Adm. News, p. 4567.

It is equally obvious that Congress wanted to separate certain narcotic conspiracies from the ambit of 18 U.S.C. §371, the general conspiracy section, at least for punishment purposes, and Congress must have been aware of the difficulties in attempting more stringent penalties under the general conspiracy statute for conspiracies to commit particular acts. Cf. *Braverman* v. *United States*, 317 U.S. 49 (1942); *United States* v. *Gardner*, 202 F. Supp. 256 (N.D. Calif. 1962). It is erroneous to conclude, as did the Court in *Gardner*, that from the above reasoning it follows that Congress intended to alter or water down the elements of a prima facie conspiracy case. This takes on more meaning from the decision in the case of *United States* v. *DeViteri*, 350 F. Supp. 550 (E.D. N.Y. 1972). In that case, the Court states, at 552:

> "The court has not been able to find any judicial decisions, with reference to this relatively new section of the Code, on the issue of whether or not overt acts need to be alleged in an indictment grounded on 21 U.S.C. §846. There is no legislative history reporting any discussion of this conspiracy section. But, from the declared purpose of the (Act) . . . there does not appear to have been any intention or attempt on the part of the Congress to change the previous law,

relating to narcotics conspiracies, contained in 21 U.S.C. §§174 and 176a."

The *DeViteri case,* concluded that an overt act was not a necessary aspect of a well pleaded indictment under 21 U.S.C. §846.

In the case of *United States* v. *Floyd,* 496 F.2d 982 (2nd Cir. 1974), the Defendant avers that *DeViteri* was overruled *sub silentio. Floyd* also involved a count under 21 U.S.C. §846, and the court clearly held:

> "It is axiomatic that the essential elements of a conspiracy are an unlawful agreement and an overt act in pursuance of the agreement. United States v. Agueci, 310 F.2d 817, 828 (2nd Cir. 1962), cert. denied, 372 U.S. 959 (1963) . . . the court charged that to prove a conspiracy the evidence must show that the Defendants knowingly and willfully joined the conspiracy and that 'one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment . . .' " 496 F.2d 987-988.

In the case of *United States* v. *Cotham,* 363 F. Supp. 851 (W.D. Texas, 1973), the Court specifically notes that "of course, at least one overt act in furtherance of the criminal agreement, must be shown in order to prove the offense." 363 F. Supp. at 854.

The violation of 21 U.S.C. §846, as charged in Count I, is unconstitutionally vague and indefinite as applied to the defendant.

The statute, as noted previously, reads:

> "Any person who . . . conspires to commit any offense defined in this subchapter is punishable . . ."

The word "conspires" has no fixed or technical meaning in Federal criminal law outside of the crime of conspiracy as set forth in 18 U.S.C. §371, for the paramount reason that there is no Federal common law crime of conspiracy. What is meant by "conspires" must be discovered by the legislative history of the act, cases interpreting the act, analogous statutes and common sense.

The legislative history in regard to "conspiracy" is, at best, sadly lacking in detail.

Cases interpreting the act are split in their holdings referring to a proper definition of a conspiracy under this section. *United States* v. *DeViteri, supra,* holds that there is no requirement to plead or prove an "overt" act. *United States* v. *Cotham, supra,* states that it is mandatory.

21 U.S.C. §846, as it now reads is unclear and meaningless. It results in a prosecution where the prosecutor is unsure of whether he must prove overt acts, and a defendant that is unsure as to whether a mere agreement to do an unlawful act of the agreement plus an actual step to carry out the unlawful act is sufficient to convict. It fails to give proper notice to a potential defendant of what conduct is, or is not, illegal.

As stated in *Russell* v. *United States, supra* at 764:

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' *United States* v. *Cruikshank,* 92 U.S. 542, 558 . . . (1876)"

This admonition takes on special meaning in regard to conspiracy indictments. A conspiracy charge can be a

dangerous will-o'-the wisp, both difficult to refute and difficult to define.[1]

In *Krulewitch* v. *United States,* 336 U.S. 440, 448 (1949), the Supreme Court discussed in some detail the advantages and abuses of conspiracy indictments. Justice Jackson, in a concurring opinion, noted:

> "This case illustrates a present drift in the federal law of conspiracy . . . Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic; The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in administration of justice.
>
> "The modern crime of conspiracy is so vague that it almost defies definition."

See also *Yates* v. *United States,* 354 U.S. 298, 334 (1957), which states that the "function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work' . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."

The Fifth Amendment guarantees to a defendant a trial by due process and the Sixth Amendment states that he shall have the right to be informed of the nature and cause of the accusation. Both guarantees are violated by the vagueness of 21 U.S.C. §846; or by an indictment

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[1] The statute is unclear on its face. 21 U.S.C. reads, "Any person . . ."; 18 U.S.C. §371 reads, "If two or more persons . . ." Quaere: Does §846 mean that if one individual conspires that it logically follows that he can be indicted under this section?

containing that statute which states no more than the word "conspire", and deletes a definition thereof.

Defendant's other issue involves the Federal co-conspirator hearsay rule which allows hearsay statements of a co-conspirator to be introduced prior to a showing of a conspiracy by other evidence. The First Circuit, in *United States* v. *Honneus, supra,* (decided two months after the instant case began) decided to follow the rule of the Fifth Circuit espoused in *United States* v. *Apollo,* 476 F.2d 156, 163 (5th Cir. 1973). Now an instruction is required explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent non-hearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony.

In our case the Defendant objected at the start to all hearsay statements of the alleged co-conspirator, but the Court of Appeals said the Defendant did not request an instruction to the effect that the evidence to be considered by the jury in determining whether defendant was part of any conspiracy must be independent non-hearsay evidence. The Defendant did request an instruction that would have told the jury that in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members. The court replied: "I charged that, that is my own material, what he said and what he did."

Defendant submits that he should be entitled to a new trial free of all the hearsay statements and that he objected sufficiently so that an appropriate instruction should have been given, or in the alternative the Court should have

allowed Defendant's Motion To Strike all the testimony concerning conversations with Johnson. A prima facie agreement must be shown before the exception to the hearsay rule can come into play. *United States* v. *Clayton*, 450 F.2d 16, 20 (1st Cir. 1971). No prima facie agreement was shown here before the hearsay statements were allowed into evidence, severely prejudicing the Defendant.

Conclusion

Defendant contends that 21 U.S.C. § 846 requires an overt act to make it pass constitutional muster or in the alternative that it requires an overt act because Congress did not intend to eliminate that requirement. Due to the apparent split among the Federal Courts this Court should decide this issue to aid prosecutors and other citizens in knowing exactly what the crime of conspiracy under 21 U.S.C. §846 entails.

Defendant also contends that this Court should decide that the objections and requests of the Defendant should have triggered the *Honneus* rule, or in the alternative, that since no prima facie agreement was shown prior to the introduction of the hearsay statements a new trial should be granted.

For the reasons hereinabove set forth, the Defendant submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL A. PARIS

Of Counsel:
LEPPO & PARIS

Appendix A

United States Court of Appeals
For the First Circuit

No. 74-1417

UNITED STATES OF AMERICA,

APPELLEE,

v.

EDWARD DEJESUS,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Michael A. Paris, with whom *Leppo & Paris* was on brief, for appellant.

Charles E. Chase, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

June 10, 1975

COFFIN, *Chief Judge*. Defendant appeals from judgments of conviction on two counts, one charging conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, the other possession with intent to distribute and distribution in violation of 21 U.S.C. § 841(a)(1).

Agents met with a codefendant, Johnson, in Boston and discussed a purchase of five kilograms of cocaine at $20,000 a kilogram. After some delay, Johnson told the agents that

his Puerto Rican connection was in town. An agent subsequently observed defendant drive to a pre-arranged meeting place where Johnson joined him in his car for a brief conversation. Later in the evening, an agent called Johnson and learned that only two kilograms were for sale, since the other three had just been sold in New York, and that the price had been increased to $22,000 a kilogram. Johnson, still later the same evening, delivered a sample; if the sample proved satisfactory, the agents were to make their purchase at about midnight.

Shortly after midnight, at the agreed-upon place, a vehicle parked behind the agents' vehicle and Johnson got out, told the agents that his man was with him with the "stuff", and entered the agents' car. One agent then entered the other car. Defendant, the driver of that car, handed him a paper bag, saying the amount was two kilograms. When the agent complained, defendant explained that he had sold the other three kilograms in New York the preceding weekend. When the agent asked the price, defendant replied, "$44,000", said the cocaine could be cut three times and that he could deliver five kilograms every ten days. At this point both Johnson and defendant were arrested.

This skeletal narration of the evidence suffices to dispose of defendant's claim that there was insufficient evidence to support the verdicts. Defendant would have us consider the evidence as establishing only that he was present at the delivery of the drugs. But defendant, according to testimony obviously believed by the jury, not only delivered the merchandise but also showed his awareness of the prior changes in price and quantity and the reason for the latter change, which Johnson had earlier told the agents. He also held himself out as capable of being a substantial and regular supplier. This is, on the whole, stronger and more direct evidence of participation in a conspiracy than that which

we found sufficient in *United States* v. *Doran*, 483 F.2d 369 (1st Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

A second asserted ground for reversal is that the court allowed government agents to testify as to conversations with codefendant Johnson, who did not testify and was not put to trial with defendant. Beginning early in the trial a key government witness, agent Staffieri, was asked and allowed, over objection, to answer questions concerning his conversations with the absent Johnson. At the outset the court gave a limiting instruction couched as follows:

> "THE COURT. . . . The evidence which I am allowing in now as to telephone conversations between this witness and Mr. Johnson is to be considered by you when you retire to deliberate, only if you find that there was in fact a conspiracy between the defendant and Mr. Johnson and that the conversation was in furtherance of some purpose of the conspiracy and that the conversation was during the lifetime of the conspiracy."
>
> * * * *
>
> "I will instruct you to disregard the whole thing, if at the time the government rests, there isn't enough evidence from which you can find conspiracy, if you believe the evidence. Whether you do find it is a matter for your decision."

Apparently satisfied with this, defense counsel remained silent until the witness adverted to the "Puerto Rican connection"; overruling the objection, the court reminded the jury of its earlier limitation. When the witness related his conversation about price with Johnson, defense counsel moved for a further limiting instruction "as it affects the defendant DeJesus". The court again referred to the earlier limitation which it felt the jury understood, adding, "I don't think I need repeat it with each question, unless there

is some other limitation you have in mind?" Counsel replied: "I do not know if the jury is fully instructed that none of this evidence is against DeJesus at this point, there is no conspiracy shown." The Court: "I told them it is [their] decision they have to make when they retire to deliberate. If they don't find a conspiracy, they disregard the entire line of testimony which relates only to Mr. Johnson."

The testimony of agent Staffieri continued, followed by that of agent Doyle, with frequent disclosures of conversations with Johnson, always objected to, the court often referring to its prior ruling in admitting the testimony.[1] In the charge to the jury, the court again stressed that statements attributed to Johnson were to be considered only if the jury found that defendant "voluntarily and knowingly entered into an agreement", adding, at one point, that "in deciding whether the defendant became a member of the conspiracy, you must determine his membership on the basis of evidence as to what he said or what he did, if it appears to you that the conspiracy was in fact formed." At the conclusion of the charge, defense counsel called to the court's attention one of his requested instructions which would have told the jury that "in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members."

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[1] Early in the testimony of the second witness, agent Doyle, the court reminded the jury that the testimony as to Johnson's conversations "is to be considered by them only if they find there was a conspiracy proved, to which the defendant became a knowing and voluntary member, that the conversation was during the lifetime of the conspiracy and for the purpose of advancing an aim or object of the conspiracy. Otherwise, it is to be disregarded by the jury." No suggestion for additional instructions was forthcoming from defense counsel.

The court replied: "I charged that, that is my own material, what he said and what he did."

What was omitted from all the cautionary instructions was the admonition that the evidence to be considered by the jury in determining whether defendant was part of any conspiracy must be independent non-hearsay evidence. *United States* v. *Honneus,* 508 F.2d 566, 576-77 (1st Cir. 1974), *cert. denied,* 43 U.S.L.W. 3584 (April 28, 1975). Defendant overargues the point, saying that there was no such evidence in this case. We have disposed of such an argument in discussing the sufficiency of the evidence. Nevertheless, there remains a gap in the instructions. The government underargued its case on this point, contenting itself with asserting that there was independent evidence of defendant's role in the conspiracy, without addressing itself to the defect in instructions.

This case was tried on October 29 and 30, 1974, almost two months before our decision in *Honneus,* where we stated that in cases tried subsequently the rule announced in *United States* v. *Apollo,* 476 F.2d 156, 163 (5th Cir. 1973), should be followed, requiring an instruction "explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent non-hearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony."[2] Although generalized objections were raised to all offers of testimony as to Johnson's conversations, it is clear that neither the court nor defense counsel had in mind the refinement which now concerns us. This appears most directly when the court, at an early point in its sequence of rulings, inquired whether the defense had any limitation in mind other than those which had been given,

[2] *See also United States* v. *Gomez-Rojas,* 507 F.2d 1213, 1223 (5th Cir. 1975).

and received an unenlightening answer. Not even in the objections to the final instructions did the defense clarify this point, the requested instructions being slightly better than the court's, but not explicitly excluding hearsay in the determination of participation in the alleged conspiracy. Moreover, there was no indication that counsel disagreed with the court's opinion that it had in essence given the requested instruction. We find no reversible error.

Finally, defendant argues that the indictment under 21 U.S.C. § 846 is faulty, in that count 1 failed to allege an overt act.[3] Defendant cites a number of cases which, on analysis, fall into three categories. Some involve conspiracy cases brought under statutes requiring allegation and proof of overt acts, such as 18 U.S.C. § 371; others involve indictments charging overt acts and the issue is whether the evidence was sufficient to prove the crime as charged, *e.g., United States* v. *Toombs,* 497 F.2d 88 (5th Cir. 1974); *United States* v. *Sarno,* 456 F.2d 875 (1st Cir. 1972); still others are cases where the court seems to assume, without discussion, that an overt act must be alleged in a prosecution under 21 U.S.C. § 846, *e.g., United States* v. *Williams,* 503 F.2d 50 (6th Cir. 1974); *United States* v. *Floyd,* 496 F.2d 982 (2d Cir. 1974); *United States* v. *Cotham,* 363 F. Supp. 851 (W.D. Texas 1973).

The only case directly dealing with the pleading requirements of 21 U.S.C. § 846, which has been called to our attention, is *United States* v. *DeViteri,* 350 F. Supp. 550

[3] The statute does not in terms require such an allegation. It reads, "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable . . . ."

An additional challenge is made, on vagueness grounds, to § 846 itself. To the extent that this challenge is founded on the argument that the allegation of an overt act is necessary to supply specificity, we deal with this in the text. Insofar as it is based on the singular subject ("Any person"), and the suggestion that the statute may reach a "conspiracy" in which only one person participates, we do not think that the point merits discussion.

(E.D. N.Y. 1972). We find compelling its analysis of authorities under predecessor statutes, 21 U.S.C. §§ 174, 176a,[4] its reference to Supreme Court interpretation and other legislation not specifically requiring an overt act, and its conclusion that Congress in enacting the Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.*, of which § 846 is a part, did not intend to change the prior law relating to narcotics conspiracies, contained in §§ 174 and 176a.

Affirmed.

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[4] In *United States* v. *Clayton*, 450 F.2d 16, 21 n. 14 (1st Cir. 1971), *cert. denied*, 405 U.S. 975 (1972), we recognized the issue as related to § 176a, but expressed no opinion as to its proper resolution.

Appendix B

FORM NO. USA-36-29
(Rev. 3-25-71)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 74-146-C

UNITED STATES OF AMERICA
v.
EDWARD DEJESUS
and
CLARKE D. JOHNSON

INDICTMENT

The grand jury charges:

COUNT ONE

That from on or about the first day of May, 1974, to and including the eighth day of May, 1974, at Boston, in the District of Massachusetts, and elsewhere, EDWARD DEJESUS and CLARKE D. JOHNSON did knowingly and intentionally conspire, combine, confederate and agree together and with each other and with divers other persons whose names are to the grand jury unknown, to commit an offense against the United States, that is, to knowingly and intentionally distribute a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 846.

COUNT TWO

That on or about the third day of May, 1974, at Boston, in the District of Massachusetts, CLARKE D. JOHNSON knowingly and intentionally did unlawfully possess with intent

to distribute and distribute, a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

That on or about the seventh day of May, 1974, at Boston, in the District of Massachusetts, EDWARD DEJESUS and CLARKE D. JOHNSON knowingly and intentionally did unlawfully possess with intent to distribute, and distribute, a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841 (a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

That on or about the eighth day of May, 1974, at Boston, in the District of Massachusetts, EDWARD DE JESUS and CLARKE D. JOHNSON knowingly and intentionally did unlawfully possess with intent to distribute, and distribute, a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841 (a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL

(s) ANTHONY G. (Illegible)
Foreman of the Grand Jury.

(s) CHARLES E. CHASE
Assistant United States Attorney.

DISTRICT OF MASSACHUSETTS. , 19

Returned into the District Court by the Grand Jurors and filed 3:35 P.M., May 16, 1974.

(s) AUSTIN W. JONES, JR.
Deputy Clerk.

Appendix 6

RELEVANT STATUTES

Title 18, United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 21, United States Code, Section 841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance

Title 21, United States Code, Section 846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Fifteenth Section of the Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifteenth Section of the Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-53

EDWARD DEJESUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the hearsay evidence introduced at his conspiracy trial was not accompanied by a proper limiting instruction and that an indictment charging a conspiracy in violation of 21 U.S.C. 846 must allege an overt act.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of possessing cocaine with intent to distribute, and with conspiracy to do the same, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1) and 846. He was sentenced to concurrent terms of four years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (Pet. App. 13-19).

The evidence at trial established that Drug Enforcement Administration Special Agent Daniel Staffieri, acting in an undercover capacity, met with Clarke Johnson on several occasions (App. 14-15).[1] On May 3, 1974, Johnson offered Staffieri five kilograms of cocaine for $20,000 per kilogram and tendered a sample (App. 17-19, 90-91).

On May 7, 1974, Johnson called Staffieri and stated that "the stuff was in Boston" (App. 18). Later that day, after meeting with Johnson, Staffieri called again, suggesting that the deal be consummated at Pier 4, a Boston restaurant (App. 27-29). An unidentified person then came on the phone; after a short conversation between the person and Staffieri,[2] Johnson told Staffieri that three of the kilos had been sold in New York and only two remained to be sold at an increased price of $22,000 a kilo (App. 29-30). After agreeing to this price, Staffieri suggested that he meet Johnson and his companion at the Holiday Inn parking lot; Johnson agreed (App. 30).

The Holiday Inn meeting took place at 11:15 p.m.; Johnson provided another sample and suggested a later meeting, at midnight, at the Prudential Center (App. 31-32, 97). Staffieri and another agent arrived at the Prudential Center on time. Johnson approached their car five minutes later, stating that he had the cocaine but wanted to change cars (App. 32-33, 98-99). About 30 minutes later a 1966 brown Plymouth parked behind the agents' car; Johnson walked over to their car and stated that the man with the cocaine was in the vehicle behind them (App. 33-34, 99-100). Staffieri entered the Plymouth; petitioner introduced himself as "Tito" and placed a paper bag on Staffieri's lap (App. 34-35). Staffieri examined the four clear plastic bags within and asked petitioner what was in them.

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[1]Johnson, who was arrested and indicted with petitioner, was released on bail and fled. He has not been apprehended. "App." designates the appendix in the court of appeals.

[2]The trial judge would not allow Staffieri to testify about the substance of this conversation (App. 29-30).

Petitioner replied that it was "the total two kilograms altogether" (*ibid.*). Staffieri then asked about the other three kilos and petitioner stated he had already sold the other kilos in New York City (*ibid.*). Staffieri asked about the selling price; petitioner said that it was $44,000 (*ibid.*). When Staffieri asked if the cocaine was as good as the sample, petitioner volunteered that "you can cut it three times, you still should end up with 35 percent coke" (*ibid.*). Finally, petitioner offered to "deliver five kilos every ten days" (App. 36). He and Johnson were arrested on the spot.

1. Petitioner contends (Pet. 11-12) that the district court's cautionary instructions to the jury concerning the use of hearsay evidence did not adequately inform it that only nonhearsay evidence could demonstrate petitioner's connection to the conspiracy, and so allow hearsay to be considered. The record reveals, however, as the court of appeals noted (Pet. App. 17-18), that petitioner never requested such an instruction. This lack is fatal to petitioner's argument. Fed. R. Evid. 103(a)(1). Petitioner objected to any testimony concerning the agent's telephone conversations with Johnson (Pet. App. 16-17), but did not clarify the grounds of this objection.

The district court told the jury (App. 16-17):

> Anything done during the life of the conspiracy for the purpose of furthering the aims of the conspiracy, is admissible against anyone that the jury finds knowingly and voluntarily became a member of that conspiracy.
>
> The evidence which I am allowing in now as to telephone conversations between this witness and Mr. Johnson is to be considered by you when you retire to deliberate, only if you find that there was in fact a conspiracy between the defendant and Mr. Johnson and that the conversation was in furtherance of some purpose of the conspiracy and that the conversation was during the lifetime of the conspiracy.

* * * * *

> This is conditionally admissible evidence. I will instruct you to disregard the whole thing, if at the time the government rests, there isn't enough evidence from which you can find conspiracy, if you believe the evidence. Whether you do find it is a matter for your decision.

As the court of appeals noted: "Apparently satisfied with this, defense counsel remained silent" until the witness averted to another hearsay statement (Pet. App. 15). The court then reminded the jury of the limitation placed on such testimony (App. 19); petitioner never stated that he objected to the omission from the instruction of a reference to the quantum of nonhearsay testimony necessary to allow hearsay to be used. Nor did petitioner object upon this ground when the court instructed the jury, at the close of the trial, that (App. 219):

> If you find the defendant voluntarily and knowingly entered into an agreement, whether it be a formal or informal agreement or he entered into an understanding to cooperate with Johnson in selling a couple of kilos of cocaine, then you may consider those statements made by Johnson in the absence of Mr. DeJesus, if you also find those statements were made to advance some purpose or understanding or agreement, while the agreement or understanding was in effect between them.
>
> If you find the government has not proved beyond a reasonable doubt that this defendant entered into some kind of agreement with Johnson, looking toward the sale of kilos of cocaine, you are to disregard completely and not let your verdict be based on anything done by Johnson or anything said by Johnson in the absence of Mr. DeJesus.

As the court of appeals correctly noted, "it is clear that neither the court nor defense counsel had in mind the refinement" belatedly suggested (Pet. App. 17).

The omission was hardly plain error, so that it could be noticed without objection. In most courts of appeals the question of the sufficiency of the nonhearsay evidence is for the judge, not for the jury. *United States* v. *Honneus*, 508 F.2d 566, 576-577 (C.A. 1), certiorari denied April 28, 1975, No. 74-972, held (prospectively) that the jury should be allowed to make this decision. See also *United States* v. *Apollo*, 476 F.2d 156, 163-164 (C.A. 5). But petitioner was tried prior to *Honneus* and did not preserve his point.[3] It is therefore unnecessary to address the question whether *Honneus* and *Apollo* were properly decided.

2. Petitioner also contends (Pet. 5-11) that Count 1 of the indictment, which charged a conspiracy under 21 U.S.C. 846, should have alleged the commission of an overt act.[4] Because petitioner's sentence on Count 1 is concurrent with his sentence on Count 4, the Court need not consider this argument. *Benton* v. *Maryland*, 395 U.S. 784, 787-791; *Barnes* v. *United States*, 412 U.S. 837, 848. In any event, both petitioner and the court of appeals correctly observed that the statute itself does not require the allegation of an overt act (Pet. 6; Pet. App. 18 and n. 3). The only other case expressly to consider the question, *United States* v. *DeViteri*, 350 F. Supp. 550, 551-552 (E.D. N.Y.), held that an overt act need not be alleged or proved in a prosecution under 21 U.S.C. 846.

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[3]There is no doubt that ample nonhearsay evidence—under any standard of sufficiency—established petitioner's participation in the conspiracy. See Pet. App. 13-14, 17; see also pages 2-3 *supra*.

[4]Although no overt act was expressly alleged in Count 1, several overt acts eventually were proved. See Pet. App. 13-14.

Petitioner cites other cases which, he contends, are to the contrary (Pet. 5-6). But he cited the same cases to the court of appeals, which correctly observed (Pet. App. 18) that "[s]ome involve conspiracy cases brought under statutes requiring allegation and proof of overt acts, such as 18 U.S.C. §371; others involve indictments charging overt acts and the issue is whether the evidence was sufficient to prove the crime as charged [citations omitted]; still others are cases where the court seems to assume, without discussion, that an overt act must be alleged in a prosecution under 21 U.S.C. §846 [citations omitted]." The instant case marks the first explicit consideration of this question by any court of appeals. There is, perforce, no conflict among the circuits, and it is not now necessary for this Court to undertake to decide whether it will eventually be necessary to address the question.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[5]Petitioner also seems to contend (Pet. 8-10) that Section 846 is unconstitutionally vague because it does not expressly state whether or not the indictment must allege an overt act. But this ambiguity, if any, has been cured by the decision of the court of appeals (Pet. App. 18, n. 3). Petitioner does not contend that he was prejudiced by this alleged vagueness or that he did not understand the charge he was called upon to defend; Count 1 simply alleges a conspiracy to perform the crimes and acts enumerated in Counts 2 to 4.

DOJ-1975-08